



NEW YORK  
CITY BAR

May 3, 2022

President Joseph R. Biden  
The White House  
1600 Pennsylvania Avenue  
Washington, D.C. 20500

Hon. Charles E. Schumer  
Majority Leader  
United States Senate  
322 Hart Senate Office Building  
Washington, DC 20510

Hon. Mitch McConnell  
Minority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, DC 20510

Hon. Nancy Pelosi  
Speaker  
United States House of Representatives  
1236 Longworth House Office Building  
Washington, DC 20515

Hon. Kevin McCarthy  
Minority Leader  
United States House of Representatives  
2468 Rayburn Office Building  
Washington, DC 20515

**Re: United States Assistance to the International Criminal Court for Russian War Crimes**

Dear President Biden, Senate Majority Leader Schumer, House Speaker Pelosi, Senate Minority Leader McConnell, and House Minority Leader McCarthy:

We write on behalf of the New York City Bar Association (City Bar) to urge prompt action by Congress and the Biden Administration to assist the International Criminal Court (ICC) in its investigation of war crimes in Ukraine by Russian Federation forces, including the areas surrounding Kyiv, in Mariupol and at the Kramatorsk train station. In previous statements, the City Bar has condemned the illegality of the Russian Federation's invasion of Ukraine (a crime of aggression and a blatant violation of the United Nations Charter),<sup>1</sup> called for the prompt investigation of alleged war crimes by Russian Federation forces and urged the establishment of

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<sup>1</sup> See <https://www.nycbar.org/media-listing/media/detail/russian-federations-invasion-of-ukraine>. (All websites last visited May 2, 2022.)

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

an *ad hoc* tribunal on the crime of aggression against Ukraine,<sup>2</sup> and condemned censorship of independent media reporting in Russia and apparent targeting of journalists in Ukraine.<sup>3</sup>

We now call on the United States to abandon its prior reluctance to support the ICC so that the escalating pattern of war crimes being carried out in Ukraine can be properly investigated, adjudicated and sanctioned. We hope that these actions, which are authorized by the Dodd Amendment to the American Servicemembers' Protection Act of 2002 (ASPA), can also be a first step in an overall reappraisal by our country of the role and importance of the ICC in building a lawful world that does not tolerate such criminal acts by national leaders. We have in the past called on the United States to join the ICC and repeal ASPA<sup>4</sup> and believe the current atrocities being visited on the people of Ukraine demonstrate clearly the need for that action, along with the urgent assistance authorized by the Dodd Amendment.

## I. Escalating War Crimes and Crimes Against Humanity

The credible reports of atrocities committed in Bucha and Irpin and at the Kramatorsk train station appear to involve intentional and targeted military action against civilians, resulting in what appear to be mass executions, torture, and gender-based violence (including rape) amounting not only to individual war crimes but, because of their scale and the number of civilians apparently targeted, to crimes against humanity. The City Bar has called on the international community to independently investigate all such crimes committed in Ukraine, including reports of forced civilian deportations to Russia and Russian attacks on both humanitarian aid deliveries and civilians seeking to flee war zones. The international community must pursue all avenues to ensure that the perpetrators of these atrocities, including senior military and civilian leaders of the Russian Federation, are held accountable. In investigating these crimes, a victim-oriented approach to justice is paramount, including ensuring that witnesses and survivors are prioritized for health services, safe refuge, family reunification and access to legal services.<sup>5</sup>

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<sup>2</sup> See <https://www.nycbar.org/media-listing/media/detail/russian-war-crimes-in-ukraine-investigation-request>.

<sup>3</sup> See <https://www.nycbar.org/media-listing/media/detail/concerns-over-russian-attacks-on-freedom-of-expression-and-press>.

<sup>4</sup> Prior City Bar reports are available at: <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-the-proposed-international-criminal-court> (July 2002); <https://www.nycbar.org/pdf/report/Intl%20Law%20-%20Letter%20to%20Bush%20re%20ICC.pdf> (March 2003); [https://www.nycbar.org/pdf/report/ICC\\_Transition.pdf](https://www.nycbar.org/pdf/report/ICC_Transition.pdf) (Dec. 2008); [https://s3.amazonaws.com/documents.nycbar.org/files/20073083-Digest\\_on\\_International\\_Criminal\\_Court\\_Investigations\\_in\\_Africa\\_AFRICAN\\_5.20.16.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/20073083-Digest_on_International_Criminal_Court_Investigations_in_Africa_AFRICAN_5.20.16.pdf) (May 2016); <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-to-international-criminal-court-regarding-war-crimes-against-the-yazidi> (April 2017); <https://www.nycbar.org/media-listing/media/detail/support-for-the-international-criminal-court> (April 2020); <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/rebutting-recent-icc-criticism> (June 2020); <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposing-sanctions-on-international-criminal-court> (July 2020); <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/condemning-the-implementation-of-sanctions-against-senior-staff-of-the-international-criminal-court> (Nov. 2020); <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/rule-of-law-biden-harris-transition-recommendations> (Jan. 2021).

<sup>5</sup> As noted by the ICC itself, the security of victims is crucial. It is important to take preventive measures such as avoiding mentioning identifying details of individuals or exposing their cooperation with the ICC and other investigative mechanisms.

## II. After Determining it has Jurisdiction, the ICC Has Opened an Investigation into Alleged War Crimes and Crimes Against Humanity by Russian Officials

Since March 1, 2020, more than 40 States Parties of the ICC (also referred to as “the Court”) have taken a major step to request the Court to open an investigation into alleged atrocities committed in Ukraine.<sup>6</sup> On March 1, Lithuania referred the situation to the ICC for investigation, followed by a joint referral from 38 States Parties, including Albania, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, New Zealand, Norway, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.<sup>7</sup> On March 7, the Republic of North Macedonia associated itself with the joint referral initiative.<sup>8</sup> And on March 11, Japan referred the case to the Court as well.<sup>9</sup>

As a result, on March 2, 2022, ICC Prosecutor Karim Khan issued a statement, announcing he would open an investigation “arising from [his] preliminary examination, and encompassing any new alleged crimes falling within the [ICC’s] jurisdiction.”<sup>10</sup> Khan explained that, “there is a reasonable basis” to open an investigation into alleged atrocities committed in Ukraine. Specifically, the scope of the ICC’s investigation would encompass “any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.”<sup>11</sup>

Although Ukraine signed the Rome Treaty in 2000, it did not ratify it.<sup>12</sup> Since Russia has refused to sign the treaty, neither country is a State Party to the Rome Statute.<sup>13</sup> This renders both parties unable to refer possible crimes to the Court.<sup>14</sup> The ICC, however, still has jurisdiction over crimes committed within Ukrainian territory because Ukraine has previously accepted jurisdiction

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<sup>6</sup> International Criminal Court Website, *Situation in Ukraine, ICC-01/22*, <https://www.icc-cpi.int/ukraine>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Office of the Prosecutor, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INTERNATIONAL CRIMINAL COURT (March 2, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine>.

<sup>11</sup> International Criminal Court Website, *Situation in Ukraine, ICC-01/22*, <https://www.icc-cpi.int/ukraine>; see also Office of the Prosecutor, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INTERNATIONAL CRIMINAL COURT (March 2, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine>.

<sup>12</sup> *Ukraine*, COALITION FOR THE INT’L CRIMINAL COURT, <https://www.coalitionfortheicc.org/country/ukraine#:~:text=Ukraine%20signed%20the%20Rome%20Statute,jurisdiction%20from%20November%202013%20onward>.

<sup>13</sup> Thomas O Falk, *Is Putin likely to face the ICC over Russia’s actions in Ukraine?*, ALJAZEERA (Mar. 7, 2022), <https://www.aljazeera.com/news/2022/3/7/is-putin-likely-to-face-the-icc-over-russias-actions-in-ukraine>.

<sup>14</sup> *Id.*

under Article 12(3) of the Statute through two declarations.<sup>15</sup> The first declaration accepted ICC jurisdiction for all alleged crimes committed on Ukrainian territory from November 21, 2013 to November 22, 2014.<sup>16</sup> The second declaration extends this timeframe, expressly accepting the ICC’s jurisdiction indefinitely from February 20, 2014 onward.<sup>17</sup> On July 1, 2019, Ukraine amended its Constitution to recognize the ICC jurisdiction, paving the way for the country’s future ratification of the Rome Statute.<sup>18</sup>

### III. United States Assistance to ICC and Other War Crimes Investigations in Ukraine

The ongoing efforts by the ICC and the international community to bring a measure of accountability for the escalating war crimes and crimes against humanity described above require the fullest cooperation and assistance from the United States. That cooperation and support are both limited by current U.S. law, which prohibits the U.S. from joining the ICC or rendering generalized support for the ICC in its war crime investigations and prosecutions. The Foreign Relations Authorization Act for Fiscal Years 2000 and 2001 (FRAA) specifically prohibits the U.S. from donating funds or materiel to the ICC, and the 2002 American Servicemembers’ Protection Act, 22 U.S.C. sections 7421-7433 (ASPA), prohibits, among other things, providing staff training or the loan of personnel to the ICC or the sharing of intelligence with the ICC. There is, however, an important exception to these ASPA limitations – the so-called “Dodd Amendment” to the statute. The Dodd Amendment, 22 U.S.C. section 7433, provides that “Nothing in [ASPA] shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda [sic], leaders of Islamic Jihad, *and other foreign nationals accused of genocide, war crimes or crimes against humanity.*” (emphasis added).

The Dodd Amendment appears on its face, and can certainly be read, to provide the U.S. with sufficient flexibility to render “assistance to international efforts to bring to justice” responsible Russian commanders and civilian leaders for war crimes in Ukraine, including assistance to and cooperation with the ICC in cases involving those individuals. Indeed, a January 15, 2010 Memorandum from the Office of Legal Counsel of the Department of Justice concluded that, in light of the Dodd Amendment, neither FRAA nor ASPA prohibits the U.S. from furnishing “informational assistance” to the ICC in “particular ICC cases involving foreign nationals accused of genocide, war crimes or crimes against humanity, or from training ICC personnel or detailing Government employees to the ICC” in such cases.<sup>19</sup>

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<sup>15</sup> Office of the Prosecutor, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.”* INTERNATIONAL CRIMINAL COURT (Feb. 28, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=20220228-prosecutor-statement-ukraine>; see also International Criminal Court Website, *Situation in Ukraine, ICC-01/22*, <https://www.icc-cpi.int/ukraine>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Ukraine*, COALITION FOR THE INT’L CRIMINAL COURT, <https://www.coalitionfortheicc.org/country/ukraine#:~:text=Ukraine%20signed%20the%20Rome%20Statute,jurisdiction%20from%20November%202013%20onward>.

<sup>19</sup> *Memorandum for Mary DeRosa, Legal Adviser, National Security Council*, Jan. 15, 2010, <https://int.nyt.com/data/documenttools/2009-olc-memo-on-support-for-the-icc/b1a4ef1b0c5dc790/full.pdf>, cited in

As the Dodd Amendment makes clear, the U.S. can only assist such international efforts when they involve foreign nationals, reinforcing the widespread view that the U.S. remains committed to a double standard with respect to ICC investigations and trials of U.S. nationals for war crimes. While this may continue to undermine the credibility of the U.S. as it assists war crimes in Ukraine, the Dodd Amendment does *appear* to provide a legal basis for the U.S. to provide broad-ranging and necessary assistance, including helping uncover and document evidence, to the ICC in connection with those war crimes.

Because its work in the Ukraine investigation will involve mass-scale atrocities, it is widely expected that ICC investigators will need to interview hundreds of witnesses, view extensive video footage, examine thousands of pieces of materiel and otherwise conduct an unprecedented level of forensic investigation. The U.S. can assist this effort with funds, personnel, intelligence information and political support in other countries, all consistent with the Dodd Amendment's authorization to render assistance to "international efforts to bring to justice" alleged war criminals who are not U.S. nationals.

While the United States can thus assist the investigation of Russian war crimes in Ukraine, we are hopeful that the need for that assistance will demonstrate, to both the Congress and the Biden Administration, the importance of additional actions to bolster the role of the ICC. As a first step, we believe that the massive scale of war crimes in Ukraine should provide the opportunity for Congress to either repeal ASPA (and the similar provisions of FRAA) entirely, or at least amend those statutes to remove their most counterproductive provisions, including ASPA's authorization for the use of force to "free" any U.S. national held in custody by the ICC. We also continue to urge U.S. to formally join the Rome Statute so that our nation can assume its own role in the ICC and help enforce the international criminal law on which we rely to condemn Russian actions in Ukraine.

There are also clear signs that some members of Congress now recognize the importance of the ICC and may be open to an increased U.S. role in support for the ICC. Despite past Congressional reluctance to support the ICC, on March 15, 2022, the U.S. Senate passed a bipartisan resolution calling for investigations into Russian President Vladimir Putin and his regime for alleged war crimes committed during the illegal invasion of Ukraine.<sup>20</sup> In announcing the resolution, Sen. Lindsey Graham (R-SC) said, "This is a proper exercise of jurisdiction. This is what the court was created for." A bipartisan group of House members has also called for the ICC to prosecute President Putin if Russia harms Ukrainian President Zelensky.<sup>21</sup>

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Oona Hathaway, *The U.S. finally sees the point of the International Criminal Court*, April 13, 2022, <https://www.washingtonpost.com/outlook/2022/04/13/war-crimes-russia-ukraine-icc/>.

<sup>20</sup> *US Senate Approves Resolution Probing Putin for War Crimes*, ASSOCIATED PRESS (Mar. 15, 2022), <https://www.usnews.com/news/politics/articles/2022-03-15/us-senate-approves-resolution-probing-putin-for-war-crimes>.

<sup>21</sup> Adam Keith, *Justice for Ukraine and the U.S. Government's Anomalous Int'l Criminal Court Policy*, JUST SECURITY (March 8, 2022), <https://www.justsecurity.org/80565/justice-for-ukraine-and-the-u-s-governments-anomalous-intl-criminal-court-policy/>. Similarly, Former ICC Prosecutor Fatou Bensouda called on member states to "adequately fund the institution." She also cited a need for help arresting suspects and funding investigations as the office has been unable to keep up "with the soaring demand for investigations around the world." Mike Corder,

Another important step that the U.S. can take to address war crimes in Ukraine is to help fund the international Trust Fund for Victims. The Trust Fund is a separate entity from the ICC and is dedicated to helping the victims in ICC investigations meet their basic needs and seek remedies for the many harms they have suffered. Funding the Trust Fund is not precluded under ASPA and would be a significant acknowledgement of the importance of this ICC-related institution.

The United States played a pioneering role in international criminal law at the Military Tribunal for Nuremburg, the International Military Tribunal for the Far East (Tokyo), and in many of the subsequent international tribunals, including those for Yugoslavia and Rwanda. The ICC is now in a position to do the same for the atrocities committed daily in Ukraine. It is time for the U.S. to lend its full support to that effort.

Respectfully,

Sheila S. Boston  
President

Stephen L. Kass  
Chair, Rule of Law Task Force

Ramya Kudekallu  
Chair, International Human Rights Committee

Christopher Amore  
Chair, Military and Veterans Affairs Committee

Cc: Hon. Vaughn Ary, Director, Office of International Affairs, U.S. Department of Justice  
Hon. Lloyd James Austin III, U.S. Secretary of Defense  
Hon. Anthony Blinken, U.S. Secretary of State  
Hon. Dick Durbin, Chair, U.S. Senate Committee on the Judiciary  
Hon. Merrick Garland, U.S. Attorney General  
Hon. Chuck Grassley, Ranking Member, U.S. Senate Committee on the Judiciary  
Hon. Jim Inhofe, Ranking Member, U.S. Senate Committee on Armed Services  
Hon. Jim Jordan, Ranking Member, U.S. House Committee on the Judiciary  
Hon. Michael McCaul, Ranking Member, U.S. House Committee on Foreign Affairs

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*AP Interview: ICC Prosecutor Sees 'Reset' Under Biden*, POLITICO (June 14, 2021), <https://apnews.com/article/government-and-politics-donald-trump-joe-biden-courts-4f191309f97a3734b032960877cccac6>. See also Nahal Toosi, *Biden lifts sanctions on International Criminal Court officials*, Politico (Apr. 2, 2021), <https://sports.yahoo.com/biden-lifts-sanctions-international-criminal-151058902.html> (quoting Rep. Omar, "The staff of the International Criminal Court are public servants who dedicate their life to enforcing the most heinous crimes imaginable. If we are to live up to our values of respect for human rights and democratic norms, the United States should be leading the pursuit of international justice, not blocking it.").

Hon. Gregory Meeks, Chair, U.S. House Committee on Foreign Affairs  
Hon. Bob Menendez, Chair, U.S. Senate Committee on Foreign Relations  
Hon. Jerry Nadler, Chair, U.S. House Committee on the Judiciary  
Hon. Jack Reed, Chair, U.S. Senate Committee on Armed Services  
Hon. Jim Risch, Ranking Member, U.S. Senate Committee on Foreign Relations  
Hon. Mike Rogers, Ranking Member, U.S. House Committee on Armed Services  
Hon. Adam Smith, Chair, U.S. House Committee on Armed Services  
Hon. Jake Sullivan, National Security Advisor

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